Supreme Court, U.S.
FILED
SEP 10 1997
CLERK

No. 97-263

In The

# Supreme Court of the United States

October Term, 1996

RALPH L. READ, M.D.,

*Petitioner,*

*vs.*

MEDICAL X-RAY CENTER, P.C.,

*Respondent.*

*On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit*

## RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM P. FULLER
FREDERICK M. ENTWISTLE
JAMES E. MOORE
WOODS, FULLER, SHULTZ
& SMITH P.C.
300 South Phillips Avenue
Suite 300
Sioux Falls, South Dakota 57104
(605) 336-3890

JOHN J. MILES
*Counsel of Record*
OBER, KALER, GRIMES
& SHRIVER, P.C.
1401 H Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 326-5008

*Attorneys for Respondent*

71980 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

35 pp

## QUESTIONS PRESENTED

The Respondent, Medical X-Ray Center, P.C., restates the questions presented as follows:

1. Whether the court of appeals erred in holding that the Petitioner failed to present substantial evidence that his injury and damages were caused by any unlawful conduct of the Respondent.

2. Whether, based on the facts presented at trial, Section 2 of the Sherman Act required the Respondent to provide coverage for the Petitioner's medical practice unconditionally on Petitioner's own terms.

## PARTIES TO THE PROCEEDINGS

The Respondent, Medical X-Ray Center, P.C., has no parent or subsidiaries.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Parties to the Proceedings | ii |
| Table of Contents | iii |
| Table of Citations | iv |
| Statement of the Case | 1 |
| A. Introduction | 1 |
| B. The Relevant Facts | 2 |
| C. The Decisions Below | 7 |
| Reasons for Denying the Writ | 9 |
| I. The Eighth Circuit's Decision Does Not Conflict With Any Decision Of This Court Or Of Any Court Of Appeals. | 11 |
| A. The Decision Does Not Conflict With *Lorain Journal* Or *Aspen.* | 11 |
| B. The Decision Does Not Conflict With Any Other Decision Of This Court Or Of Any Court Of Appeals. | 14 |
| II. This Case Presents No Legal Or Policy Question On Which This Court's Guidance Is Needed. | 23 |

*Contents*

*Page*

A. The Decision Will Not "Pave[ ] The Way For Exclusionary Conduct". ..... 23

B. This Court Does Not Need To Reaffirm That The Antitrust Laws Apply To The Health-Care Sector. ..... 24

Conclusion ..... 26

## TABLE OF CITATIONS

**Cases Cited:**

*Abcor Corp. v. AM International, Inc.*, 916 F.2d 924 (4th Cir. 1990) ..... 16

*American Medical Association v. United States*, 317 U.S. 519 (1943) ..... 24

*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) ..... 11, 12, 13, 14, 16

*Bell v. Dow Chemical Co.*, 847 F.2d 1179 (5th Cir. 1988) ..... 21, 22

*Boulware v. Nevada*, 960 F.2d 793 (9th Cir. 1992) .... 25

*Chicago Professional Sports Limited Partnership v. National Basketball Association*, 961 F.2d 667 (7th Cir. 1992), *cert. denied*, 506 U.S. 954 (1992) ..... 19

*Contents*


| | Page |
|---|---|
| *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962) | 10 |
| *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) | 18 |
| *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) | 21 |
| *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) | 12 |
| *FTC v. Freeman Hospital*, 69 F.3d 260 (8th Cir. 1995) | 25 |
| *General Leaseways, Inc. v. National Truck Leasing Association*, 744 F.2d 588 (7th Cir. 1984) | 19 |
| *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978) | 10 |
| *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738 (1976) | 24, 25 |
| *Illinois v. Panhandle Eastern Pipe Line Co.*, 730 F. Supp. 826 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992) | 12, 17 |
| *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) | 11, 12, 13, 14 |

*Contents*

*Page*

*National Association of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisers Foundation*, 64 F.3d 1130 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1676 (1996) ..... 25

*Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 585 F.2d 821 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979) ..... 21

*Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987) ..... 13, 16, 24

*Polk Brothers, Inc. v. Forest City Enterprises*, 776 F.2d 185 (7th Cir. 1985) ..... 16

*Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987) ..... 16, 22

*SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 36 F.3d 958 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 2600 (1995) ..... 16

*Summit Health Ltd. v. Pinhas*, 500 U.S. 322 (1991) ... 25

*Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) ..... 10

*Trace X Chemical, Inc. v. Canadian Industries, Ltd.*, 738 F.2d 261 (8th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985) ..... 12

*Contents*


| | Page |
|---|---|
| *Trans Sport Inc. v. Starter Sportswear, Inc.*, 964 F.2d 186 (2d Cir. 1992) | 16 |
| *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589 (1st Cir. 1993) | 20 |
| *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993) | 23 |

**Statutes Cited:**

| | |
|---|---|
| 15 U.S.C. § 1 | 7, 15, 21, 22, 23 |
| 15 U.S.C. § 2 | 7, 10, 15, 16, 21, 24 |
| 15 U.S.C. § 15(a) | 9 |

**Rule Cited:**

| | |
|---|---|
| Federal Rule of Civil Procedure 50 | 8 |

**Other Authorities Cited:**

| | |
|---|---|
| I ABA Section of Antitrust Law, *Antitrust Law Developments* (4th ed. 1997) | 12, 16 |
| Patrick J. Ahern, *Refusals to Deal after Aspen*, 63 Antitrust L.J. 153 (1994) | 16 |
| III Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* (1996) | 21, 22 |

*Contents*

*Page*

IIIA Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* (1996) ..... 12, 14, 21, 22, 24

Herbert Hovenkamp, *Federal Antitrust Policy* (1994) . 16, 17

Michael Malina, *Supreme Court Update — 1985*, 54 Antitrust L.J. 289 (1985) ..... 13

Edwin Mansfield, *Microeconomics* (3d ed. 1979) ..... 17

## STATEMENT OF THE CASE

### A. Introduction

The Petitioner, Ralph L. Read, M.D., a former shareholder-employee of the Respondent, Medical X-Ray Center, P.C. ("MXC"), seeks review of the Eighth Circuit's decision that he failed to present substantial evidence that any unlawful conduct by MXC caused the damages he claimed. Read argued to the Eighth Circuit that "MXC has appealed only the rejection of its own version of the facts" (Appellee's Brief at I), and in his Petition for Rehearing that the "appellate panel's adoption of [MXC's] evidence violate[d] the Seventh Amendment prohibition against redetermination of jury verdicts" (Plaintiff/Appellee/Cross-Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, Required Statement). Now changing strategy, he argues that the issues actually were questions of law that the Eighth Circuit decided incorrectly or that the court of appeals misapplied applicable antitrust principles to the facts.

The Eighth Circuit's decision does not warrant review by the Supreme Court of the United States. The legal principles applied by the court of appeals are well-established in antitrust jurisprudence; neither those principles nor the Eighth Circuit's application of them to the facts conflicts with principles enunciated by this Court or by any other court of appeals; and the decision implicates no overriding point of federal antitrust law on which guidance from this Court or other courts is lacking. Dr. Read merely asks this Court to review whether, as a factual matter, the injury he claimed was caused by any unlawful conduct of MXC. Both the district court and the court of appeals reviewed precisely that question with the record in front of them and answered no (although the district court felt constrained to hold otherwise because of the jury's verdict). There is no reason for this Court to review the same facts and question yet again.

**B. The Relevant Facts**

Dr. Read was a shareholder-employee of MXC, a professional corporation of radiologists in Sioux Falls, South Dakota, from 1975 to 1988. He resigned in 1988 because his perceived heavy workload and call schedule at MXC put him "in a very frustrated frame of mind" (Tr. 1436); he was "burned out" (*id.* 171); he was experiencing a "mid-life crisis" (*id.* 1451); and he did "not need the money that full-time work produces" (*id.* 1449). He was tired of his job and wanted to work part-time (*id.* 219-20), not taking call on nights and weekends as other MXC radiologists did (Ex. 841).[1]

Dr. Read first tried to persuade MXC to restructure its entire operation so that all its radiologists could work only when they wished. Tr. 1432-35. When this failed, he resigned because of "the way night call was scheduled" (*id.* 1786), even though he knew that he would leave MXC shorthanded (*id.* 1700-01, 1710-11).

After first telling MXC that he did "not intend to practice medicine for a year or more" (Tr. 1489-90), Read decided that he wanted to practice part-time. To accommodate him and because it was shorthanded, MXC entered into an independent-contractor agreement with Read by which it paid him a yearly salary for twenty weeks of work per year to help MXC with its cases. Under the contract, Read was not on MXC's call schedule for night, weekend, or holiday work. Although he sporadically took call cases,[2] he was inflexible and uncooperative in providing call coverage when

---

1. Dr. Read now claims that he "sought to create a different practice style, one that emphasized quality of care rather than high incomes." Petition for Certiorari ("Pet.") 5. Neither the record, nor Read's citation for that proposition (Tr. 1450), supports that claim.

2. In Read's citation for this fact (Pet. 5, citing Tr. 1468), Read actually said, "I wasn't on the night call schedule or the weekend schedule."

requested, a problem that MXC experienced with him throughout his tenure as an independent contractor. *Id.* 2023.

About March of 1990, claiming that MXC had "exploited" him (Tr. 2031), Read decided to establish an independent solo radiology practice. He made little or no effort, however, to compete for business at what he now refers to as "the only point[s] of market entry" (Pet. i) for radiologists in Sioux Falls. Then, when his practice was not as successful as he wished, he left Sioux Falls for a radiology fellowship and brought this antitrust suit against his former partners alleging a number of purported predatory acts:

1. Read complains about MXC's exclusive contract with the Veterans Administration ("VA") hospital in Sioux Falls. Pet. 5. The VA had issued a request for proposals for a five-year exclusive contract and was considering vendors at the time Read decided to form his independent practice. Yet the uncontroverted evidence showed that (a) while at MXC, Read had wanted to "dump" the VA contract (Tr. 2584); (b) Read did not even submit a bid for the contract (*id.* 2159); (c) the VA, not MXC, demanded the long-term contract (*id.* 2123); (d) MXC won the contract after competitive bidding and after the VA negotiated MXC's price down (*id.* 2130); and (e) the VA was extremely happy with the contract (*id.* 2162, 2166).

2. Read also complains about the contract between MXC and Central Plains Clinic ("CPC"), a physicians group in Sioux Falls. Yet the evidence showed that (a) MXC obtained that business because it, in effect, offered CPC a lower price than in the past, a fact Read admits (Pet. 5); and (b) Read made little effort to compete for the contract (Tr. 1747-50).

3. Read claims that MXC entered into an exclusive contract with McKennan Hospital in Sioux Falls. Pet. 6. Yet the evidence showed that: (a) while McKennan tried to force MXC to accept an

exclusive contract, MXC continually refused (Tr. 2374-77); (b) McKennan could recruit other radiologists if it were dissatisfied with MXC (*id.* 342); (c) Read himself admitted that there was no exclusive contract (*id.* 1505); (d) there has been no exclusive contract to this day (*id.* 393); and (e) when Read told McKennan that he wanted to practice there, McKennan raised concerns about his ability to cover his practice, and Dr. Read never attempted to address those concerns (*id.* 349-51). Accordingly, McKennan made a unilateral decision to permit only MXC to read cases there (*id.* 2375) without any contract.

4. Read claims that MXC "enforced an exclusive contract at Canton-Inwood" Hospital, a short distance from Sioux Falls. Pet. 5. But the evidence showed that: (a) an MXC physician, by himself and apart from MXC, had the contract with Canton-Inwood (Tr. 1006); and (b) that physician was looking for a partner to work with him at Canton-Inwood and decided to look for someone else when Read refused to commit to become a partner (*id.* 1117-34).

5. Finally, Read complains that MXC refused to cover his part-time practice at Sioux Valley Hospital ("SVH") — that it "declined to accept *unconditionally* referrals from Dr. Read's customers." Pet. 3 (emphasis added). Mischaracterizing MXC's actions by employing emotional and pejorative false allegations that MXC "discriminated" against his customers and forced him to pay a "penalty payment" or "monopoly rent," Read argues that MXC had an absolute duty to provide coverage for him, on his unilaterally dictated terms, with no consideration of the practical issues and problems that its covering his practice would cause.

The evidence was uncontroverted that MXC offered to cover Read's practice if he would enter into a written coverage agreement by which he would inform MXC in advance when he planned to work at SVH and pay MXC an unspecified amount, to be negotiated, for the problems and costs that MXC would incur in providing him

with coverage. Read, however, flatly refused even to discuss any type of coverage agreement.

The evidence also disclosed a plethora of reasons why, without some type of agreement, MXC would be leery of providing the coverage that Dr. Read demanded. First, only after being forced to do so did Read even post a schedule indicating when he would be present at SVH to render services himself. Tr. 1579. As MXC doctors testified, the scheduling of its physicians to cover the different facilities at which it provides services was one of the most difficult, complex, and divisive functions of the group. *Id.* 156, 168. MXC typically established its schedule six months in advance. *Id.* 2066.

Second, Dr. Read did not even abide by the schedule he finally did post. As he admitted, after posting a schedule stating that he would be at SVH three hours a day, sometimes he was there more and sometimes less. Tr. 1411. Not surprisingly, both hospital and MXC personnel had difficulty reaching him when he was supposed to be available. Tr. 2049, 2613.

Third, MXC knew from past experience with Dr. Read that, as the district court explained, he had "almost a pathological dislike for providing night and weekend coverage" (Petitioner's Appendix ["Pet. App."] 20) and was uncooperative in trying to work out call coverage (Tr. 1351).

Fourth, when Read finally did post a schedule of availability, it stated that he would be at SVH only three hours a day during the week (and none on Thursdays) and one hour a day on weekends. *Id.* 1580, 1766-67. Thus, it was clear that Read's practice would be part-time at best. To cover Read's practice as he demanded, MXC would have to ensure that it had available capacity at SVH at the times when Read was absent during the workday. In addition, MXC would have to cover Read's practice during the least desirable work

times — nights, weekends, and holidays.[3] Even an SVH administrator testified that he was "not very comfortable" with Read's very limited hours of availability. *Id.* 1233.

Fifth, MXC physicians expressed concern about potential run-ins with Dr. Read after MXC read a test when Read was absent and Read appeared unexpectedly and complained that MXC had not left the test for him to read. Tr. 2048.

Dr. Read never approached MXC to request that the parties sit down and discuss an arrangement by which MXC would cover his practice. Tr. 142, 1771, 2268, 2605-06. When MXC physicians took the initiative to do so, they found it difficult to communicate with him. *Id.* 3267. Testimony showed that MXC, had Read been willing to discuss a coverage arrangement, would have tried to reach some type of agreement to provide coverage. *Id.* 2292.[4] Instead, Read attempted to force MXC to cover his practice whenever he might not be present through a so-called "choice card" system, by which referring physicians would choose between Read and MXC; but if Read were not present, MXC would be a default choice, obligated to cover Read's practice whenever Read, without informing MXC in advance, chose to be absent. MXC naturally objected to this procedure.

In an attempt to accommodate both Dr. Read's coverage demand and its own concerns, MXC took the initiative and had its attorney draft a proposed coverage agreement and send it to Dr. Read. The draft agreement provided that MXC would cover Read's

---

3. Dr. Read's petition suggests that MXC's concerns about his availability were limited to night and weekend coverage — so-called "after hours." Pet. 18. That is incorrect. Rather, Read also expected MXC to cover his practice during the majority of all workdays.

4. The record showed that, as a factual matter, MXC did cover Read's practice. Tr. 1304-05, 1357, 2048-49.

practice if Read would provide MXC with his work schedule in advance and pay MXC a fee to be negotiated. Tr. 2060-61. Testimony showed that MXC's primary concern in seeking a written agreement was to lock Read into and obtain a schedule of his presence at SVH so that it could schedule its radiologists accordingly (*id.* 1356, 2060-65, 2070, 2612) and that MXC would have signed the contract if Read had paid it as little as one dollar. MXC's desire for the contract had "nothing to do with the money" (*id.* 2064).

Read waited almost three months before even acknowledging the draft. Tr. 1802-04. Calling it "some kind of practical joke" (*id.* 1601), he told MXC's attorney when they finally met to discuss the draft that he would not pay even one dollar for coverage (*id.* 1646-47, 1806-07). But it was not just the money to which he objected; rather, he rejected the rest of the contract as well. *Id.* 1649. He told MXC's attorney to stop working on any contract (*id.* 1648) and left town for a radiology fellowship for which he had applied before he responded to MXC's draft coverage agreement.[5] Ironically, it was Dr. Read, not MXC, who refused to deal.

### C. The Decisions Below

1. After trial, the jury found that MXC violated both Sections 1 and 2 of the Sherman Act. The district court readily granted MXC's motion for judgment as a matter of law on Dr. Read's Section 1 claim. It held that the evidence failed to show any agreement with SVH (because Read could always practice there) (Pet. App. 17) or at McKennan (because although "McKennan . . . wanted to enter into an exclusive contract . . . the defendant refused

5. Read incorrectly refers to MXC's draft agreement as a "take-it-or-leave-it" offer. Pet. 7. That the money term in the contract was left blank and that the meeting between MXC's attorney and Read was to discuss provisions that the contract should include belie this statement. The draft contract was just that — a draft to start discussion.

to enter into such agreement") (*id.*). The court recognized that MXC did have an exclusive contract with the VA (which MXC did not dispute) but that MXC merely won a competitive-bidding contest and that "plaintiff also could have submitted a bid." *Id.* 18.

The district court came within an inch of granting MXC's motion for judgment as a matter of law on Dr. Read's Section 2 monopolization claim as well because it believed that Read failed to prove that any injury he suffered was caused by MXC rather than by his own shortcomings. Notwithstanding its view that Read's practice failed because of his own lack of effort, the court "yield[ed] [its] views of the facts to the jury's findings." *Id.* 29.

Numerous facts supported the district court's belief that Read, himself, caused any injury he suffered: (a) His "unwillingness to work any kind of a reasonable work schedule" and refusal to cover or obtain coverage for his practice (Pet. App. 20); (b) the obligation of MXC's radiologists to pay other radiologists for back-up when they did not want to take their scheduled call, but Read's refusal to do so (*id.* 16); (c) Read's refusal of MXC's offer of coverage, even if the cost were as little as one dollar (*id.* 15-16); (d) Read's business "plan [that] was based on requiring defendant to cover his practice without any cost to him" (*id.* 19); (e) Read's "almost pathological dislike of being on call nights and weekends" (*id.* 20); and (f) MXC's lack of obligation to cover Read's practice, "particularly in view of plaintiff's unwillingness to advise defendant of when he was not going to be available" (*id.*).

2. The court of appeals merely acted on the district court's conclusions. It, in effect, reminded the district court that juries are not infallible and that Rule 50 exists to permit trial courts to correct obvious mistakes. Specifically, and for almost the same reasons as the district court, the Eighth Circuit concluded that "a reasonable jury could only find that Dr. Read's business failed because of his own competitive flaws. Thus, Dr. Read did not establish causation, an essential element of his claim . . . ." Pet. App. 3.

The Eighth Circuit's opinion is far from the "summary disposition" that Dr. Read unfairly claims it is. Pet. 24. Rather the opinion itself shows that the court considered each instance of purported predatory conduct in reaching its decision. Because the parties' briefs had focused on Read's claim that MXC had caused his injury at SVH by refusing to cover his practice, the Eighth Circuit also focused on that issue. It recognized that MXC's primary concern in seeking a coverage agreement with Read was to ensure that MXC would know when it had to provide coverage: "MXC was willing to incorporate Read on its SVH schedule to ensure 24-hour coverage of his patients if Dr. Read signed a coverage contract and provided his own schedule in advance." Pet. App. 4. The court of appeals emphasized that Read did not even acknowledge MXC's offer of coverage for three months and then "informed MXC of his refusal to negotiate a coverage contract for any price." *Id.* 5. Accordingly, it concluded that "Read's lack of coverage cannot be blamed on MXC." *Id.* 6.

The court of appeals indicated that because of its decision on the causation issue, deciding whether MXC engaged in predatory conduct was unnecessary. In dicta, however, it explained that MXC's request for a coverage contract was not a predatory act because MXC had "legitimate business justifications" for its actions. Pet. App. 8. It considered that Read wanted to " 'free-ride,' avoid the cost of 24-hour coverage by forcing MXC to provide it for him for free, so he could undercut MXC's prices" (*id.* at 6, 8) and that MXC needed Read's schedule of availability (*id.* at 4). Accordingly, the court of appeals reversed the district court's decision denying MXC's motion for judgment as a matter of law on Dr. Read's Section 2 claim.

## REASONS FOR DENYING THE WRIT

Rather than focusing on the Eighth Circuit's holding — that he failed to prove "causation," a requirement under Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), for every plaintiff seeking

damages — Dr. Read focuses on the "predatory-conduct" element for monopolization liability under Section 2 of the Sherman Act, claiming that MXC refused to deal with him. But Dr. Read concedes, as he must, that MXC did not refuse to deal; the parties agree that MXC offered to provide coverage for Dr. Read's practice if he would enter into a coverage agreement with MXC. Thus, Dr. Read's petition has to focus almost exclusively on the question of whether Section 2 required MXC to provide coverage for his practice, to use Read's word, "unconditionally" (Pet. 3); that is, without Read informing MXC of when it would have to furnish coverage and with Read paying nothing for that coverage. Nothing in the antitrust laws required MXC to disrupt its own operations or to subsidize Read's practice so that he could work part-time.[6]

---

6. Dr. Read raises two other minor points that merit little discussion. First, citing *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962), he claims that the court of appeals focused only on the SVH coverage question rather than considering "MXC's exclusionary practices as a whole." Pet. 20-22. A reading of the court of appeals' opinion belies this argument. Although the court of appeals did not include any explicit statement to the effect that "Dr. Read, we have considered all your alleged predatory conduct together and do not believe that singularly or in combination, it constituted predatory conduct," the opinion shows clearly that the court did just that. The opinion discusses each alleged predatory act.

Second, Dr. Read argues that the court of appeals erred by holding that a contract that forecloses competitors can be excused as a "customary practice." Pet. 19-20. The court of appeals, however, did not hold or even suggest that this fact would dispositively resolve the question of whether MXC's request for a coverage agreement was predatory. The court simply mentioned it as one fact that, at most, it felt was relevant. Moreover, contrary to the language in *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 998 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978), that such evidence is not relevant (Pet. 19), the fact clearly is relevant in determining whether particular conduct is predatory. That those without monopoly power engage in the same conduct is probative that the conduct has a legitimate business justification and is not undertaken solely to monopolize a market. *E.g.*, *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 927-928 (10th Cir.) (noting that ordinary business practices are not predatory), *cert. dismissed*, 423 U.S. 802 (1975).

Understandably, but erroneously, Read argues that the court of appeals' opinion indicating that MXC had no such obligation conflicts with decisions of this Court, conflicts with decisions of other courts of appeals, and involves a principle of law on which guidance is absent but necessary. The reason that Dr. Read's petition should be denied is simply that none of these arguments is correct.

## I.

## THE EIGHTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY COURT OF APPEALS.

### A. The Decision Does Not Conflict With *Lorain Journal* Or *Aspen*.

Contrary to Dr. Read's assertion, neither *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), nor *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), are "directly applicable here." Pet. 11. Thus, it should have come as no surprise to Dr. Read that the Eighth Circuit did not cite them.

1. Unlike the defendants in *Lorain Journal* and *Aspen*, who refused to deal with their competitor, MXC did not refuse to deal with Dr. Read. It offered to negotiate a coverage contract, which he refused even to discuss. Because of Dr. Read's refusal, neither court below, unlike the courts in *Aspen*, could determine if a firm offer might have been made, what the terms of that offer might have been, or whether an agreement might have been reached. Dr. Read, rather than MXC, was the party that refused to deal.

2. Both *Lorain Journal* and *Aspen* hold that any duty to deal with competitors, even by a firm with monopoly power, is the exception rather than the rule. The firm has a "general right" not to deal, but that right is "qualified." *Lorain Journal*, 342 U.S. at

155; *see Aspen*, 472 U.S. at 600. "When such a duty is found, it must be treated as exceptional." IIIA Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 765b at 101 (1996) ("*Areeda & Hovenkamp*"). Under no circumstances, however, does any firm have an "unconditional" duty to deal on terms dictated unilaterally by its competitor. *See Illinois v. Panhandle E. Pipe Line Co.*, 935 F.2d 1469, 1484 (7th Cir. 1991) ("Monopolists needn't acquiesce to every demand placed upon them by competitors or customers."), *cert. denied*, 502 U.S. 1094 (1992); *Trace X Chem., Inc. v. Canadian Indus., Ltd.*, 738 F.2d 261, 267 (8th Cir. 1984) (" 'Section 2 . . . does not give purchasers the exclusive right to dictate the terms on which they will deal,' . . . nor does it require a monopolist to accede to every demand of its competitors or customers"), *cert. denied*, 469 U.S. 1160 (1985).

3. As Dr. Read recognizes, conduct is not predatory if a legitimate business justification exists for it. Pet. 11 n.3 (*citing Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992)); *see generally* I ABA Section of Antitrust Law, *Antitrust Law Developments* 274-75 (4th ed. 1997) ("even if a monopolist's refusal to aid a competitor is based partly on a desire to restrict competition, antitrust liability may be avoided if the monopolist's conduct was also based on a legitimate business justification").

In *Lorain Journal*, the defendant newspaper made no attempt even to put forth, much less prove, a legitimate business justification for its refusal to accept advertising from customers who also advertised on the radio station, and thus the courts there had to look no further than the challenged conduct by itself. There was nothing more than a refusal to deal by a firm with monopoly power solely for the purpose of driving its competitor from the market. Indeed, this Court explained that the lower court "found expressly that the purpose and intent of [defendant's conduct] was to destroy the broadcasting company." *Lorain Journal*, 342 U.S. at 148-49.

Here, there was no such finding and could not have been; to the contrary, both the district court and court of appeals found that MXC requested a coverage agreement for other, legitimate reasons — an issue not even before the courts in *Lorain Journal*.[7]

4. This Court's decision in *Aspen*, if relevant to this case at all, supports MXC because its analysis clearly recognized that refusals to deal, even by firms with monopoly power, are not predatory if the refusal is justified by "any normal business purpose" or "any efficiency justification." *Aspen*, 472 U.S. at 608. In *Aspen*, as one commentator explained, "[T]he narrow issue before the Supreme Court was only whether there was evidentiary support for the implicit factual finding that there was no valid business reason for the defendant's conduct." Michael Malina, *Supreme Court Update — 1985*, 54 Antitrust L.J. 289, 293 (1985). This Court held there was such evidence, noting that "[p]erhaps most significant . . . , [defendant] did not persuade the jury that its conduct was justified by any normal business purpose." Indeed, the Court explained that the defendant "fail[ed] to offer any efficiency justification whatsoever." *Aspen*, 472 U.S. at 608.

---

7. In addition, the factual situation in *Lorain Journal* is not analogous to that here. For *Lorain Journal* to be "directly applicable," not only would the legitimate-business-justification question have had to arise, but the radio station would have had to demand that the newspaper supply it with employees because it would be costly for it to hire its own so the radio station could stay on the air 24-hours a day, without telling the newspaper when its employees would have to work for the radio station. In that analogous situation, it seems highly unlikely that any court would have found that the newspaper's refusal to accede constituted predatory conduct. *Cf. Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 377-78 (7th Cir. 1986) ("But [plaintiff] had no right under the antitrust law to take a free ride on its competitor's sales force. You cannot conscript your competitor's salesmen to sell your product even if the competitor has monopoly power and you are a struggling new entrant."), *cert. denied*, 480 U.S. 934 (1987). *Olympia* can be distinguished on the ground that the defendant there was exiting the market, but that fact would not have changed the analysis or the result.

The situation here is the reverse: MXC did put forth and persuade both the district court (although it believed that it had to accept the jury's verdict) and the court of appeals that its actions were justified by a "normal business purpose." Read can and does argue that MXC's normal business purposes were invalid as a matter of law, but that was not the issue in, and so there is no conflict with, *Aspen*.[8] Read is simply wrong in arguing that under the Eighth Circuit's reasoning in this case, the plaintiff in *Aspen* would have been forced to accept the defendant's "coercive offer" there. Pet. 12. Here, the court of appeals indicated that MXC's offer was reasonable and justified. In *Aspen*, the courts found the opposite. There is simply no conflict between the analyses and results in *Aspen* and here.

**B. The Decision Does Not Conflict With Any Other Decision Of This Court Or Of Any Court Of Appeals.**

Perhaps realizing that neither *Lorain Journal* nor *Aspen* supports his arguments here, Dr. Read moves to the crux of his petition — that MXC had no legitimate business justification for requesting a coverage agreement as a matter of law. He appears to make three arguments: (1) that the prevention of free-riding may not constitute a legitimate business justification in Section 2 cases

---

8. *Aspen* can be distinguished on a number of other grounds as well, but perhaps the most obvious is that, as in *Lorain Journal*, the facts were not analogous to those here. To make them so, the plaintiff in *Aspen* would have had to demand that the defendant supply it with employees so that it could operate its ski facilities around the clock without telling the defendant when their services might be needed. Moreover, MXC, in requesting a coverage agreement, did not break off a longstanding relationship with a competitor as in *Aspen*, since Dr. Read had worked for MXC as an independent contractor. *Cf.* IIIA *Areeda & Hovenkamp* ¶ 772c3 at 193, 194 (noting that *Aspen* did not hold that a firm with monopoly power must enter into cooperative relationships when none existed previously, "and there is no reason for thinking it would have done so"; "[w]e would not interpret [*Aspen*] to give the plaintiff the right to create a new venture where none had existed before").

as opposed to in Sherman Act, Section 1 cases (Pet. 13 & n.5); (2) that there was no free-riding problem in this case to begin with (*id.* 12, 13-14); and (3) that the Eighth Circuit should have provided some type of more in-depth analysis to determine whether the costs of Dr. Read's free-riding "were in line with the costs sought to be imposed on Dr. Read" (*id.* 12).

1. Preliminarily, Dr. Read erroneously assumes throughout his petition that MXC's free-rider concern was its only concern about providing coverage to Read without a coverage agreement, and thus that preventing Read from free-riding was its only legitimate business justification. That assumption is incorrect. As the record showed, MXC's major reason for requesting a coverage agreement was to force Read to establish, disclose, and furnish MXC with a schedule of his availability at SVH so that MXC would know when to have sufficient personnel there to cover his practice. Uncontroverted testimony emphasized that the money Read would pay, if any, under the agreement was a minor concern.

Given Read's history of demanding to work part-time, his unavailability when needed and called, his eschewing night and weekend call, and the complexity of MXC's scheduling personnel to cover many facilities and its need to schedule far in advance, MXC clearly was justified in requesting that Read inform it in advance of when he would and would not cover his own practice at SVH. Depending on the volume of Read's work that MXC would have to cover, MXC could have been forced, ultimately, to hire additional personnel or at least to shift personnel from other facilities to SVH when Read was absent.

2. Any suggestion that the prevention of free-riding is not a legitimate business justification in Section 2 cases, as opposed to Section 1 cases (the only type that Read cites in this section of his petition [Pet. 12-15]), is incorrect. Numerous courts have applied

the doctrine in Section 2 actions. *E.g.*, *Trans Sport Inc. v. Starter Sportswear Inc.*, 964 F.2d 186, 190-91 (2d Cir. 1992); *Abcor Corp. v. AM Int'l, Inc.*, 916 F.2d 924, 930 (4th Cir. 1990); *Olympia Equip. supra*, 797 F.2d at 377-78 (a decision also undermining Read's suggestion that a free-rider justification might not apply where "the challenged restraint was imposed by a monopolist on a . . . competitor" [Pet. 12-13]). Commentators agree. *E.g.*, I ABA Section of Antitrust Law, *Antitrust Law Developments* 276 (4th ed. 1997) ("Refusing to deal . . . may be justified [in Section 2 cases] where it is intended to prevent free riding and to enforce a legitimate limited distribution program.").[9] Indeed, Professor Hovenkamp has explained in some detail that the "most troublesome" aspect of the *Aspen* case was the defendant's failure to put forth the "obvious" justification that when revenue from the joint venture was divided according to actual use of the mountains as the plaintiff demanded, the venture "permitted [plaintiff] to take a free ride on [defendant's] stronger market position." Herbert Hovenkamp, *Federal Antitrust Policy* § 7.5 at 264 (1994).[10]

---

9. Similarly, if Read is suggesting that the free-rider justification might not exist outside the context of "a vertical restraint imposed by a manufacturer on a dealer" (Pet. 13), that suggestion is belied by numerous decisions involving free-riding and horizontal relationships or agreements. *E.g.*, *SCFC ILC, Inc. v. Visa U.S.A., Inc.*, 36 F.3d 958, 972 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 2600 (1995); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185, 190 (7th Cir. 1985).

10. The Ahern article, cited at Pet. 13 n. 5 for the proposition that a free-rider justification should not apply in § 2 cases, is inapposite. There, the author is criticizing the use of the justification where the defendant claims that the free-riding affects a market other than that in which the plaintiff and defendant compete and that the refusal to deal would force the plaintiff to enter a second market in order to compete with the defendant in the first. Patrick J. Ahern, *Refusals to Deal after Aspen*, 63 Antitrust L.J. 153, 177 n. 126, 178 (1994). That factor is absent here. On the other hand, the author notes that "[t]he classic free rider argument has, of course, succeeded in section 2 refusal-to-deal cases." *Id.* at 178.

3. Clearly, Dr. Read's plan was to free-ride off MXC by forcing it to devote its resources to covering his practice so that he would not have to bear the cost of doing so himself. Dr. Read admitted that MXC would incur the cost of providing him with twenty-four-hour coverage rather than his incurring that cost himself (*id.* 1822). MXC's economic expert, based on Read's testimony, had no difficulty in concluding that Read was attempting to free-ride on MXC. *Id.* 2862-63.

Free-riding occurs "when an action taken by an economic unit results in uncompensated benefits to others." Edwin Mansfield, *Microeconomics* 456 (3d ed. 1979). Or, as Professor Hovenkamp explains, "A free rider is a firm who takes free advantage of a service or product that is valued by customers but provided by a different firm." Herbert Hovenkamp, *Federal Antitrust Policy* § 5.2bl at 188 (1994). Both definitions precisely fit the admitted facts here. Read attempted to force MXC to provide him with a valuable service for free so that he could compete with MXC by charging lower prices permitted by his lower costs resulting from MXC's subsidizing his practice. MXC would have had to absorb a cost that Read otherwise would have had to pay. Nothing in the antitrust laws required MXC to "cut its own throat" in this manner, *Illinois v. Panhandle E. Pipe Line Co.*, 730 F. Supp. 826, 883 (C.D. Ill. 1990), *aff'd*, 935 F.2d 1469 (7th Cir. 1991), *cert. denied*, 502 U.S. 1094 (1992), to help Dr. Read by providing him with free inputs for his business.

Amazingly, Dr. Read argues that he never "sought to misappropriate any investment made by MXC," and thus that "there is no free rider problem in the first instance." Pet. 12; see also *id.* 13. But that is exactly what he tried to do by attempting to force MXC to cover his practice for free. MXC "invests" in, as closely as possible, hiring only the number of radiologists necessary to cover its own practice at the different facilities where it provides services. By demanding that MXC supply employees for his

practice as well, Read sought to exploit some of the benefits from those investments, at no cost, for himself. Add to this Read's testimony that he expected to obtain the lion's share of radiology business at SVH (perhaps ninety percent, he said [Tr. 1556]) and his testimony that MXC ultimately might have to hire five additional radiologists to cover his practice (id. 1593), and the free-rider problem becomes particularly obvious and serious.[11]

Just as amazingly, Dr. Read argues that, even if he was misappropriating MXC's investment, there was no free-rider problem because MXC could simply jack-up its prices to its own customers to recoup the cost of his free-riding. Pet. 18. This argument is both incorrect and turns the antitrust laws on their head. In any free-rider context, the firm exploited by free-riding can attempt to increase its price to recoup its additional expense. For example, in the vertical-nonprice-restraints context, *see generally Continental T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), the full-service dealer can increase its price to cover the additional services it renders. The problem is that it then will lose sales to the free-rider because the free-rider refuses to bear the full cost of the benefits it receives from the exploited firm's expenditures and thus can charge a lower price:

> The free-rider problem in *Sylvania* arose because dealers who had spent money

---

11. Dr. Read claims that MXC's providing coverage for him is no different than "Home Depot accommodat[ing] a neighborhood hardware store by being open on Sunday." Pet. 14. For Read's analogy to hold, the neighborhood hardware store would have to be open on Sunday, need additional employees to do so, and demand that Home Depot supply them without telling Home Depot when it would have to supply them. If Home Depot were required to accede to the store's request, it would have to ensure that it had excess employees ready to serve the neighborhood store. The neighborhood store clearly would be free-riding on Home Depot's investment in its employees.

> promoting Sylvania television sets risked being undercut by other dealers — dealers who had not made such expenditures, and who thus were exploiting the market created by dealers who had. The free riders could undersell the other dealers because their costs of promotion naturally were lower.

*General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 593 (7th Cir. 1984).

The important point is that the antitrust laws do not require the exploited firm to shift the burden of a competitor's free-riding to its customers, but rather permit the exploited firm to require the party receiving the benefit to pay for it. In the one decision cited by Dr. Read, *Chicago Professional Sports Ltd. Ptrsp. v. NBA*, 961 F.2d 667 (7th Cir. 1992), *cert. denied*, 506 U.S. 954 (1992), the court rejected the free-riding justification not because the exploited firm, the NBA, was unable to increase its prices to customers of basketball broadcasts, but because "[i]t may (and does) charge members for value delivered," and thus could charge the free-rider, the Chicago Bulls, "for the Bulls' [free] ride." 961 F.2d at 675.[12]

4. Finally, Dr. Read argues that, even if he were free-riding, the Eighth Circuit erred in not analyzing whether the additional costs that MXC would incur in covering his practice "were in line with the costs sought to be imposed on Dr. Read." Pet. 12; see also *id.* 14-16. According to Read, the Eighth Circuit's failure to examine this issue "is at odds with how the free rider issue has been analyzed in other Circuits." *Id.* at 12. This is incorrect.

---

12. To the same effect is *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 592 (7th Cir. 1984) (emphasis added), where the court rejected the free-rider justification because the competitors "charged *each other*," not their customers, for the service that allegedly was the subject of free-riding.

Preliminarily, the court of appeals, of course, could not even begin to analyze this question because Dr. Read had refused to discuss a coverage agreement with MXC — at any price or on any terms. Therefore, no one could know what, if any, cost would have been imposed on Read.[13] This lack of knowledge was Read's fault, not MXC's. The evidence did show, however, that a fee was not MXC's primary concern in seeking a coverage agreement, that one dollar a year might have been sufficient, and that Read would have rejected even a one-dollar charge.[14] Read's claim now that "even a demand for one dollar would have been anticompetitive" (Pet. 16) is ridiculous. Even absent a legitimate business justification, conduct cannot be predatory unless it is unreasonably exclusionary, *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596-97 (1st Cir. 1993), and Read's own economic expert testified that his paying even $100 for backup "would represent a small cost" (Tr. 716).

Moreover, it is not clear, even from Dr. Read's petition to this Court, what precise analysis he wanted the Eighth Circuit to apply that it did not. At various points, Read suggests that the court of appeals erred by not comparing MXC's costs in providing coverage with the cost it demanded from him; by not applying a Sherman Act, Section 1 full-blown rule-of-reason analysis (Pet. 14 [criticizing the court of appeals for not determining whether the "restraint . . . on Dr. Read was reasonable"]); by not examining whether MXC's legitimate business justification was "pretextual" (Pet. 15); or by not applying a "least-restrictive-alternative" analysis by which MXC's refusal to cover without a contract apparently would be predatory in Read's view if obtaining a coverage agreement " 'went

---

13. Thus, Read's assertion that the Eighth Circuit suggested that "MXC could impose *any* cost it wished on Dr. Read" (Pet. 16 [emphasis in original]) mischaracterizes the court's opinion.

14. The lack of evidence in the record about what amount, if any, Read might have paid for coverage also undercuts his policy argument that this case presents an appropriate vehicle for this Court to examine the "raising-rivals'-costs" theory. Pet. 22.

much further than needed for the limited articulated purpose' " for it (*id.* [quoting *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 829 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979)]).

Other than one oblique, unsupported claim that MXC's asserted legitimate business justifications were pretextual in the "Summary of the Argument" portion of his brief below (Appellee's Br. 21), Dr. Read did not even raise these arguments for the Eighth Circuit to consider.[15] But even if he had, the court of appeals would have rightly rejected them.

The court of appeals should not have identified and then balanced the procompetitive and anticompetitive effects of MXC's conduct, even had Dr. Read raised the issue below. Although this type of analysis is frequently necessary in a full-blown Sherman Act, Section 1 rule-of-reason analysis to determine whether an agreement, on balance, unreasonably restrains competition, whether particular conduct undertaken unilaterally is "predatory" for purposes of Section 2 is an entirely different issue. Sections 1 and 2 are different statutes with different standards of analyses. Indeed, this Court has explained that Section 1 is a "sterner" statute because the antitrust laws are inherently more suspicious about conspiratorial activity than unilateral conduct. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-769 (1984).

Both the decisions interpreting Section 2 and commentary show that courts do not apply a Section 1-type rule-of-reason analysis in determining whether particular conduct is predatory for purposes of Section 2. *E.g.*, *Bell v. Dow Chem. Co.*, 847 F.2d

---

15. Of course, "the burden of proving that a proffered business justification is invalid or pretextual is placed on the plaintiff in a § 2 case." III *Areeda & Hovenkamp* ¶ 658f at 127 (citing cases); *see also* IIIA *Areeda & Hovenkamp* ¶ 773e at 216 ("it should be the plaintiff's obligation to persuade the judge or jury that the justification should be rejected") (quoted and relied on by Dr. Read at Pet. 15 n. 7).

1179, 1185-86 (5th Cir. 1988) (explaining that "*Aspen* does not hold that the jury can weigh the sufficiency of a legitimate business justification against the anticompetitive effects of a refusal to deal"). Professors Areeda and Hovenkamp agree and explain why:

> [O]nce a proffered business purpose has been accepted as asserted in good faith and not as a pretense, the defense does not require any kind of "balancing" of social gains against competitive harms, except in the gross sense that trivial justifications should be disregarded.

III *Areeda & Hovenkamp* ¶ 658f at 123. No balancing or full rule-of-reason analysis is appropriate because "the purpose of the business justification inquiry is not to measure the degree of net competitive harm, but rather to aid the decision-maker in characterizing the nature of the defendant's conduct [as predatory or not]." *Id.*[16]

Similarly, although some courts have folded a "least-restrictive-alternative" requirement into full-blown Section 1 rule-of-reason analysis, others reject it, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 227 (D.C. Cir. 1986) (noting that this Court did not intend lower courts to "calibrate degrees of reasonable necessity"), *cert. denied*, 479 U.S. 1033 (1987). Again, respected commentators agree: "A general antitrust tribunal is not in a good position to determine whether a less restrictive alternative is in fact viable under the circumstances." III *Areeda & Hovenkamp* ¶ 658f2 at 129.

---

16. Indeed, the authors note that "in *Aspen*, the Court did not call for any balancing of the social gains from refusing to deal or cooperate with rivals based on legitimate business purposes against the losses resulting from that refusal." IIIA *Areeda & Hovenkamp* ¶ 772c2 at 192.

Finally, even were there a least-restrictive-alternative requirement, Dr. Read suggested no reasonable alternative that would have solved the free-rider problem, or, even if free-riding were not a legitimate business justification, MXC's concern about not knowing when Dr. Read would be present at SVH and thus when it would have to cover his practice. The burden of raising and proving a less restrictive alternative was Dr. Read's. *Cf. United States v. Brown Univ.*, 5 F.3d 658, 668-669 (3d Cir. 1993) (noting that plaintiff bears the burden, in § 1 cases, of proving that defendant could have achieved comparable benefits through a less restrictive alternative).

In sum, there is no conflict between the Eighth Circuit's opinion and any opinion of this Court or any court of appeals considering whether or under what circumstances a legitimate business justification exists. Rather, after reviewing the evidence itself, it was clear to the Eighth Circuit, as it had been to the district court, that MXC had legitimate reasons to be concerned about providing Dr. Read with coverage without an agreement.

## II.

## THIS CASE PRESENTS NO LEGAL OR POLICY QUESTION ON WHICH THIS COURT'S GUIDANCE IS NEEDED.

### A. The Decision Will Not "Pave[ ] The Way For Exclusionary Conduct".

1. To argue as Dr. Read does that the Eighth Circuit's decision "paves the way for exclusionary conduct" and to suggest that health-care providers with market power, based on the Eighth Circuit's opinion, will flock to raise their rivals' costs and then cry free-riding and cite the court of appeals' opinion (Pet. 22) is simply hyperbole that unfairly denigrates the abilities of federal-court

judges to apply well-worn and acknowledged antitrust principles. If a plaintiff, as here, refuses to cooperate with a rival to obtain the benefit it seeks or attempts to free-ride, or if other legitimate business justifications exist for the challenged conduct indicating that it was not predatory, then a court should so hold. On the other hand, if the plaintiff proves the essential elements of a Section 2 violation and that, under Section 4 of the Clayton Act, the defendant's unlawful conduct caused the plaintiff's damages, then the court should and will so hold.

2. Neither the antitrust laws nor the Eighth Circuit is "hostile to would-be 'price-chopping' competitors in monopolized markets." Pet. 23. But Dr. Read, unlike the Eighth Circuit, failed to recognize a simple antitrust principle — that the goal of antitrust law, and thus of courts interpreting Section 2, is "to permit firms to enter and operate in markets *to the extent they are capable of supplying their own inputs*, and without interference from dominant firms." IIIA *Areeda & Hovenkamp* ¶ 771b at 176 (emphasis in original). In sum, "[b]rand new firms are expected to make their own way in the market," *Olympia Equip. supra*, 797 F.2d at 370; bear their own costs; and not hinder their competitors by attempting to force them to share their resources without consideration of the effect on their competitor's operations.

**B. This Court Does Not Need To Reaffirm That The Antitrust Laws Apply To The Health-Care Sector.**

1. This case has no "special significance" (Pet. 23) simply because it involves participants in the health-care sector. At this juncture in the history of antitrust jurisprudence, it hardly is necessary for this Court "to reaffirm that the antitrust laws apply to the health care industry." *Id.* 24. This Court applied the antitrust laws to physicians as early as 1943 in *American Medical Ass'n v. United States*, 317 U.S. 519 (1943); and since 1976, it has decided eleven antitrust cases involving the health-care sector, from *Hospital*

*Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738 (1976), to *Summit Health Ltd. v. Pinhas*, 500 U.S. 322 (1991). Additionally, numerous cases from every court of appeals have applied the antitrust laws to almost every type of participant and issue in the health-care sector. *Cf. Boulware v. Nevada*, 960 F.2d 793, 797 (9th Cir. 1992) ("The antitrust laws apply to hospitals in the same manner that they apply to all other sectors of the economy. Health care providers are exposed to the same liability and entitled to the same defenses as businesses in other industries.").

2. Finally, to suggest as Dr. Read does that the Eighth Circuit's "summary disposition of this case reflects a judicial approach which resists application of the antitrust laws to health care markets" is erroneous and unfair. The Eighth Circuit has a rich history of examining antitrust issues in the health-care sector. *E.g.*, *FTC v. Freeman Hosp.*, 69 F.3d 260 (8th Cir. 1995). Moreover, the antitrust principles and analysis that it applied in this case are the same that it has applied in antitrust cases involving other industries. *E.g.*, *National Ass'n of Review Appraisers & Mortgage Underwriters, Inc. v. Appraisers Found.*, 64 F.3d 1130, 1136 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1676 (1996) (holding that plaintiffs failed to prove causation; rather, they "blamed everyone but themselves . . . , but their problems can be traced directly back to [their] corporate office"). In sum, there is no indication that the Eighth Circuit is reluctant to apply, or that it misapplied here, antitrust principles in cases focusing on health-care markets.

## CONCLUSION

This Court should deny the petition for certiorari.

Respectfully submitted,

JOHN J. MILES
*Counsel of Record*
OBER, KALER, GRIMES
& SHRIVER, P.C.
1401 H Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 326-5008

WILLIAM P. FULLER
FREDERICK M. ENTWISTLE
JAMES E. MOORE
WOODS, FULLER, SHULTZ
& SMITH P.C.
300 South Phillips Avenue
Suite 300
Sioux Falls, South Dakota 57104
(605) 336-3890

*Attorneys for Respondent*